LAW OFFICES
REDDY, BEGLEY & MARTIN
1001 22ND STREET, N. W.
SUITE 350
WASHINGTON, D.C. 20037
(202) 659-5700

DENNIS F. BEGLEY
HARRY C. MARTIN
MATTHEW H. McCORMICK
CHERYL A. KENNY
ANDREW S. KERSTING

EDWARD B. REDDY
(1915-1990)

FACSIMILE NUMBER
(202) 659-5711

May 19, 1993

Roy J. Stewart, Chief
Mass Media Bureau
Federal Communications Commission
1919 M Street, N.W.
Room 314
Washington, D.C. 20554

Re: Station KCVI(FM)
Blackfoot, Idaho
File No. BAPH-920917GO

Dear Roy:

This is to advise you that Richard P. Bott, II ("Bott"), assignor in the above-referenced assignment application, will not be responding to the "Supplement to Petition to Deny" filed May 14, 1993 by Radio Representatives, Inc. ("RRI"). RRI's pleading, which supplements its October 26, 1992 petition to deny, is untimely, repetitive, presents no new facts and, in our opinion, was interposed for delay only.

However, should the Commission deem it necessary for Bott to respond to RRI's May 14 supplement, please contact the undersigned.

Very truly yours,

HARRY C. MARTIN
Counsel for
RICHARD P. BOTT, II

HCM:mlp

cc: W. Jan Gay, Esquire
Michael Wagner, Esquire
David D. Oxenford, Jr., Esquire
Gerald Stevens-Kittner, Esquire

RAB

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Application of	)	
	)	
RICHARD P. BOTT, II	)	File No. BAPH-920917GO

these were insufficient to overcome Bott's substantially superior quantitative integration proposal (100% to 0%). Initial Decision of Administrative Law Judge Edward Luton, 3 FCC Rcd 7094 (ALJ 1988). Ultimately, on February 22, 1991, the United States Court of Appeals affirmed the Commission's action.[1]

Bott now seeks to abandon his integration commitment and sell the KCVI construction permit. Bott maintains that so long as he does not profit from the proposed assignment, he has an unfettered right to abrogate the promises on which the Commission determined that grant of his application would best serve "the public interest, convenience and necessity." Citing Eagle 22, Limited, 7 FCC Rcd 5295, 5297 (1992) and TV-8, Inc., 2 FCC Rcd 1218, 1220 (1987), he claims that he must satisfy only the anti-profiting requirements of Section 73.3597(c)-(d). He argues in the alternative that he also satisfies the Section 73.3597(a) "changed circumstances" exception to the one-year operating station holding period requirement. Bott claims that changed market conditions, involving inherently mercurial station format issues which he did not decide until after the Court's affirmance, is a sufficient excuse to pass Commission scrutiny under this standard.

RRI has previously shown that Bott is mistaken about the Commission's rules and policies which apply in this context. The

---

[1] RRI remains interested in acquiring the Blackfoot construction permit on terms consistent with its past representations to the Commission. On October 28, 1992 RRI filed a Petition for Recall of the Mandate of the Court and for Remand to Reopen the Record. Moreover, RRI has requested that the Commission reopen the record in the Blackfoot comparative licensing proceeding to allow for the receipt of information relating to the subject assignment of permit application.

Commission closely scrutinizes the comparative implications raised by an assignment of permit application. Urban Telecommunications Corp., 7 FCC Rcd 3867, 3869 (1992). Moreover, the Review Board has made clear that integration credit must be denied when a commitment is conditioned on the "fickle vicissitudes of business fortune ..." Victorson Group, Inc., 6 FCC Rcd 1697, 1699 (Rev. Bd. 1991). The filing of the subject application only serves to demonstrate that Bott's integration pledge was contingent, rather than fixed and permanent in nature. Under these circumstances, the assignment application should be denied or designated for hearing.

II. Recent Developments Lend Still Further Strength to RRI's Petition.

RRI submits this Supplement not to reargue issues previously addressed by the parties but to measure the factual circumstances raised by this application against the Commission's most recent articulation of its integration policies. In Flagstaff Broadcasting Foundation v. FCC, No. 90-1587 (D.C. Cir. 1992), the U.S. Court of Appeals for the D.C. Circuit observed that the Commission has "never" reviewed its integration policies. Flagstaff, Slip Op. at 10. The Flagstaff Court also expressed its dissatisfaction with the Commission's recent "summary dismissal" of Susan Bechtel's application which was before the FCC on remand from the Court in Anchor Broadcasting Limited Partnership, 7 FCC Rcd 4566 (1992) ("Anchor Broadcasting"). In response to these expressions of judicial concern, the Commission has attempted to provide a more detailed rationale of its integration policies in its reconsideration of Anchor Broadcasting. Anchor Broadcasting

Limited Partnership, FCC 93-115 (released March 10, 1993) ("Anchor Memorandum Order and Opinion").

In the Anchor Memorandum Opinion and Order, the Commission explains that the integration factor predicts "which applicant will more likely be aware of and responsive to the needs of the community and to fulfill those needs on a continuing basis." Id. at ¶ 13 (citations omitted)(emphasis added). The integration criterion is grounded on the Commission's "predictive judgment" that this standard captures three characteristics of significant public interest dimension: integrated station ownership's heightened interest in station operations; integrated station ownership's heightened awareness of community interests; and the benefits which flow from the identity of legal accountability and day-to-day control.

> [I]ntegration provides structural, and therefore more objective, assurances that the licensee will serve the public interest ....[A]d hoc assessment[s are] inherently less certain than consistent reliance on an objective structural factor such as integration.

Id. at ¶ 16 (footnote omitted).

RRI respectfully submits that permitting an applicant to renounce an integration commitment on the basis of ephemeral changes in local radio market conditions is fundamentally inconsistent with the Commission's articulated integration rationale. No applicant, permittee or licensee has any protectable interest in a specific format or in limiting the entrance of new competitors into a market. As demonstrated previously, the FCC has consistently declined to recognize the competitive status of

stations in determining the public interest. Thus, these kinds of changes are not of sufficient importance to justify the abrogation of comparative commitments.

Every prevailing applicant will be able to identify some change in business circumstances comparable to those identified by Bott that occurs between the time that it sets forth its integration proposal and the award of a broadcast authorization. In these circumstances, there would be no "structural" or "objective" assurance that any comparative promise would result in superior service to the public because there could never be any reasonable assurance that the applicant would effectuate the proposal. The public interest will be advanced only when adequate safeguards and enforcement mechanisms stand behind the Commission's "predictive judgment." Bott asks the Commission to abandon even the pretense of enforcement.

Bott's trivial post hoc rationalization for abandoning his integration pledge wholly eviscerates the meaningfulness of such commitments and the integrity of the hearing process. Approving this assignment would reduce the FCC's comparative licensing to a charade. If commitments can be shed for little or no reason, the process becomes nothing more than a comparison of idle claims. The fact that Bott would not profit from the sale of the construction permit does not save the integrity of the process. Bott seeks Commission approval for a policy that would allow any permittee to assign a broadcast authorization to a third party who has never participated in the crucible of an evidentiary hearing and who may or may not bring those public interest benefits identified in the

1965 Policy Statement and subsequent precedent to the operation of the station. It is the evaluation of precisely these issues which consume the resources of both the Commission and the applicants and which distinguish the prevailing applicant from its competitors. Allowing the sale of a permit on so frivolous a basis as format changes in a market blithely severs the comparative evaluation of applicants and the service benefits which the public would derive from the ultimate permittee. Such a policy is indefensible.

Moreover, consent to the proposed KCVI assignment of permit would open up comparative hearings to further abuses. In a process that can be long, expensive, and capricious, the opportunity to not lose the substantial sums which must be expended in litigation will influence behavior in the same ways as would the opportunity to profit from the filing of speculative applications. Applicants will be encouraged to advance the same inflated comparative commitments with which the FCC has become too familiar since adoption of the 1965 Policy Statement. Such a course could substantially reduce an applicant's risks. If those promises prove economically untenable, they could be abandoned without detriment following the award of a construction permit based on "changed circumstances" and the presence of a buyer willing to reimburse a permittee for his expenses.

Finally, the proposed assignment flatly contravenes the policies which the Commission sought to advance in Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases, 6 FCC Rcd 157, 160, clarified, 6 FCC Rcd 3403 (1990). In this action the Commission modified the Ruarch policy,

sharply limiting the ability of applicants to disavow comparative commitments in the context of a global settlement. Under the revised rule, the last opportunity to abandon integration commitments is the date on which hearing exhibits are exchanged or July 1, 1991 (the effective date of the Ruarch policy revisions), whichever is later.[2] Clearly, Bott's request comes too late. Thus, the Mass Media Bureau has recently opposed a post-Initial Decision settlement proposal in the Gifford, Florida FM proceeding where the proposed permittee seeks to abandon its integration commitment. The Bureau contends that the award of a construction permit to an applicant in these circumstances is improper. See Order, FCC 93R-11, MM Docket 90-170 (released April 12, 1993). The Bureau is correct.

Radio Representatives, Inc. believes that recent Court and Commission actions lend added weight to its Petition to Deny the application to assign the KCVI(FM) construction permit to Western

---

[2] Technically, this Ruarch policy limitation concerns the withdrawal of integration pledges in the context of settlements. However, allowing prevailing applicants to freely escape such pledges post-grant by assigning construction permits to commitment-free third parties would create an exception which swallows up both the new rule, Section 73.1620(g), and the policies it is intended to advance.

Communications, Inc. For the foregoing reasons, the Commission should deny the proposed assignment of permit application.

Respectfully submitted,

RADIO REPRESENTATIVES, INC.

By: Gerry Stevens-Kittner

Gerald Stevens-Kittner
Peter H. Doyle
ARTER & HADDEN
1801 K Street
Suite 400K
Washington, D.C. 20006

Its Attorneys

May 14, 1993

CERTIFICATE OF SERVICE

I, Peter H. Doyle, hereby certify that a true and correct copy of the foregoing document has been served by first class mail, postage-prepaid on the following persons this 14th day of May, 1993:

Harry C. Martin, Esq.
Cheryl A. Kenny, Esq.
Reddy Begley & Martin
1001 22nd Street, N.W.
Suite 350
Washington, D.C. 20037

Lester W. Spillane, Esq.
1040 Main Street
Suite 208
Post Office Box 670
Napa, CA 94559

David D. Oxenford, Jr., Esq.
Fisher Wayland Cooper & Leader
1255 23rd Street, N.W.
Suite 800
Washington, D.C. 20037

*Roy J. Stewart, Chief
Mass Media Bureau
Federal Communications Commission
1919 M Street, N.W.
Room 314
Washington, D.C. 20554

*Sheldon M. Guttmann, Esq.
Associate General Counsel
Office of General Counsel
Federal Communications Commission
1919 M Street, N.W.
Room 602
Washington, D.C. 20554

*Mr. Michael Wagner
Mass Media Bureau
Federal Communications Commission
1919 M Street, N.W.

*Mr. W. Jan Gay
Assistant Chief
Audio Services Division
Federal Communications Commission
1919 M Street, N.W.
Room 302
Washington, D.C. 20554

Peter H. Doyle

*By Hand Delivery